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No. 1586

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

LEON WILLARD, Doing Business Under the Firm Name of LEON WILLARD & CO.,

Plaintiff and Defendant in Error,

vs.

WILLIAMSBURGH CITY FIRE INSURANCE COMPANY OF BROOKLYN (a Corporation),

Defendant and Plaintiff in Error.

BRIEF FOR PLAINTIFF IN ERROR.

T. C. VAN NESS,

Attorney for Plaintiff in Error.

SHANNON-CONMY CO., 509 CLAY STREET, S. F.

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Defendant in error, plaintiff below, brought suit in the State Superior Court to recover upon a policy of fire insurance, and Plaintiff in Error, defendant below, a foreign fire insurance company, removed the cause into the Circuit Court for the Northern District of California. Upon the coming on of the case for trial the Court, upon the opening statement of counsel for plaintiff in error, directed a verdict in favor of the defendant in error, and it is to secure a review of that ruling that the cause is brought to this Court.

The policy sued on insured defendant in error against direct loss or damage by fire to certain property in San Francisco which was destroyed in the

earthquake conflagration of April 18th, 1906. Coupled with the undertaking to make good the loss by fire the policy contained an exception to the effect that plaintiff in error *should not be liable for loss or damage occasioned by or through earthquake,* and the company's defense was, and is, that the loss to recover for which this suit was brought was occasioned by and through earthquake in that the fire which reached to and destroyed the property was started by the earthquake first herein referred to, and that but for said earthquake and said resulting fire said loss would not have occurred.

The full language of the policy upon which, in connection with the other facts pleaded, plaintiff in error bases its defense is as follows:

> "The Williamsburgh City Fire Insurance Company of Brooklyn, N. Y., in consideration of the stipulations herein named and of (here follows amount of premium) does insure (here follows name of insured and date of commencement and termination of insurance) against all direct loss or damage by fire, except as hereinafter provided, (here follows the amount of insurance and a description of property, and certain provisions of the policy not material to the question for decision).
>
> "This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or for loss or damage occasioned by or

> through any volcano, earthquake, or hurricane, or other eruption, convulsion, or disturbance; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by agreement endorsed hereon."

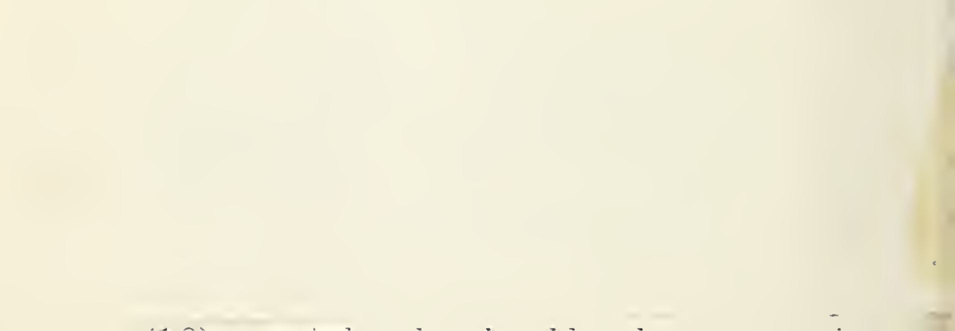
Upon the opening of the trial plaintiff in error conceded that the policy sued on had been issued to the insured, and that the property had been destroyed by fire, and that the only ground upon which plaintiff in error declined to pay was based upon the earthquake exemption hereinbefore set forth, in support of which contention counsel stated that plaintiff in error would prove the happening of the earthquake of April 18th, 1906, the starting of earthquake fires thereby, and that fires so started at points in said City other than that at which the insured property was situated had spread to and destroyed the insured property. Upon this statement a verdict was directed in favor of defendant in error and the question now up for decision is whether or not this direction can be sustained. The conclusion to be reached necessarily depends upon the effect to be given the provision of the policy that the company shall not be liable for loss or damage occasioned by or through earthquake.

The theory upon which the learned trial judge directed the verdict against us, as we understand the ruling, is, that the policy exemption applies only to a fire started by earthquake at the location mentioned in the policy and to which the insurance related; that it does not apply to, nor exempt from liability for, a loss by a fire starting at any other point, notwithstanding that such fire spreads to and reaches the insured property in natural course and without any other known or intervening agency. This construction of the exemption clause is based upon this proposition. The Company (reasons the Court) in the first subdivision of the exemption clause provides against liability "for loss caused directly or indirectly by" the perils specified in that subdivision, while in the subdivision in which earthquake is specified as an excepted peril the provision is against liability "for loss or damage occasioned by or through" such peril, and the ruling is that by this change of phraseology the company has "limited the interpretation to be put upon that second clause so that a loss to fall within that clause must arise from a fire which originates on the premises where the loss occurs."

The opinion of Judge Van Fleet delivered at the time of the ruling of which we complain (Trans. p. 41-2) seems to have been based largely upon a previous ruling by Judge Whitson in another case, and Judge Whitson's ruling, judicially interpreted by Judge Van Fleet, and the ruling of the latter now under consideration, concede that the language of the exemption clause upon which we rely would, if stand-

SPECIFICATION OF ERROR.

The trial Court erred in directing the jury to render a verdict in favor of defendant in error and in permitting judgment to be entered upon the verdict rendered pursuant to such direction.



ing alone, assuming the facts to be as set forth in the opening statement, exempt the Company from liability. But it is said that because in the same clause as to other excepted perils the exemption from liability is as to loss "caused directly or indirectly," *and because* this phrase is broad enough to cover a loss from a spread fire, it must be held that in using the phrase "occasioned by or through,"(concededly, when standing alone equally broad in meaning), in connection with the earthquake exemption, the company intended to widen the responsibility to cover losses from earthquake caused fires other than those originating upon the premises where such losses might occur. No authority is cited in support of this ruling, and we venture to say that none can be found, and that both upon principle and authority the ruling itself must be held to be unsound.

POINTS AND AUTHORITIES.

I

We first challenge the excepted-to ruling upon the ground that the premise upon which it is based, to-wit, that the phrase "occasioned by or through," found in the second subdivision of the exemption clause of the policy in suit has, independently of its position in that clause, the same meaning as the phrase "caused directly or indirectly" in the first subdivision thereof. If this premise be unsound then the foundation upon which the ruling is predicated fails; and we respectfully submit that the premise is manifestly unsound.

It may be conceded that in one of the senses in which the verbs "to cause" and "to occasion" are used they are synonymous, but in the principal uses they are not so. Upon the contrary, in their more general use there is authoritatively recognized by scholars, and in the decisions, a broadly marked difference in their meaning. And, of course, if this be so, then legally, and by reason of elementary rules which govern the construction of contracts, not only was the reasoning of the trial court and the conclusion reached without proper basis but both reasoning and conclusion should have been just the reverse of what it was, and this for the reason that, if the change of phraseology from "caused directly or indirectly" in the first subdivision of the clause, into "occasioned by or through" in the second subdivision, indicates an intention to alter the effect of the exemption as to the one or the other of the two classes of excepted perils, that intention is to be found in the difference of meaning between the two and not through disregarding those differences. If only the senses in which the two phrases are synonymous are taken into account then no result can be reached except by arbitrarily extending or narrowing the one or other of the expressions as may happen to suit the fancy.

(a) Now, is the premise of the trial judge sound, that, standing alone, the phrase "occasioned by or through" means the same thing as "caused directly or indirectly"? To this query the dictionaries answer, no.

It may be and doubtless is true that the words "this

company shall not be liable for loss caused directly or indirectly by (say) earthquake'' would be comprehensive of the kind of loss sued for in this case. But that determines nothing, for in reaching a conclusion as to the effect to be given the two phrases found in the exemption clause of the policy, there must be taken into consideration the various circumstances and conditions under which both or either of these provisions might, in some given case, be called into play, and when so considered, it is, we think, entirely clear that the words ''occasioned by or through'' must be given a more extended effect than ''caused directly or indirectly.''

In the Standard Dictionary of the English Language (1906) *''to cause''* is defined as follows: ''to be the cause or occasion of; produce; effect, bring to pass''; while *''to occasion''* is ''to cause or bring about by furnishing the condition or occasion needed for the action of a particular cause; to cause accidentally or incidentally, or simply to cause or bring about; to furnish inducement for; lead to or necessitate.''

In the Century Dictionary the definition of *''to cause''* is ''to act as a cause or agent in producing; effect, bring about, be the occasion of''; and the definition of *''to occasion''* is ''to cause incidentally or indirectly; to bring about or be the means of bringing about or producing; to lead or produce by an occasion or opportunity; to impel or induce by circumstances.''

''To cause,'' according to Webster, is ''to pro-

duce," to bring into existence, to effect by agency, power or influence, while the principal meaning given to the expression *"to occasion"* is "to cause incidentally." Again, "a cause" is defined by Webster to be "that which produces an effect; that which impels into existence, or produces what did not before exist; that by virtue of which anything is done; that from which anything proceeds, and without which it would not exist." Upon the other hand, *"to occasion"* is defined to be "an occurrence, casualty, or incident; something distinct from the ordinary course or regular order of things . . . an accidental cause; an incident, event, or fact giving rise to something else."

From these authoritative definitions it will be seen that while one of the meanings of "to cause" is synonymous with one of the meanings of "to occasion" the latter, as to its principal meaning, is given a much wider range and effect than the former. And in the light of these definitions it cannot, we think, be questioned that the Court should, as between the two phrases found in the policy, ("caused directly or indirectly by" and "occasioned by or through," etc.,) have given the latter the wider rather than the narrower effect.

If, as held by the Court, because of the change in phraseology, a change in sense was intended must not that change of sense, as we have already suggested, be found at the point where the two expressions vary? If the company stipulating for an exemption from a loss occasioned by or through a particular excepted peril intended something other and different

from the exemption from a loss caused directly or indirectly by a different excepted peril, is there any other reasonable conclusion than that the difference in effect is to be sought and found in the difference in meaning. *It is, we submit, wholly illogical to say that by the use of the substituted phrase "occasioned by or through" the insurer intended something less than those words import, and yet that is just what has been done in this case.*

(b) Turning now to judicial adjudications we find that "to cause" and "to occasion" have in the eye of the law the varying meanings found in the definitions, and that, as to kinds of cause, a broadly different effect, with wider operation, is given to the verb "to occasion."

In *Words and Phrases Judicially Defined,* Vol. 6, p. 4896, a number of cases are collected in which the Courts have recognized the difference in meaning between "to cause" and "to occasion," and in each and all of these decisions the wider effect is given to the latter expression. For the convenience of the Court we copy from the work referred to:

> "Webster defines an occasion, as distinguished from a cause, to be that which incidentally brings to pass an event, without being itself sufficient cause or sufficient reason. *Pennsylvania Co. v. Congdon,* 33 *N. E. Rep.* 759 (796."

> "Where injunctions caused delay, and the delay resulted in loss, the loss was occa-

sioned by the injunctions, though they might not be the direct cause of the loss."

Meysenberg v. Schlieper, 48 *Mo.* 426 (434)."

"The word 'occasioned' in a statute imposing a liability for damages occasioned by the failure of a railroad to construct and maintain a fence, means occasioned by that only, and therefore the contributory negligence of one allowing his stock to go on the track is a defense to an action against a railroad for violation of the statute. 'Of course, the want of a fence cannot cause injury, but it gives occasion to the injury; causes it incidentally. The word was apparently used in one sense of 'caused' and accurately used. Dr. Johnson's first definition of the verb 'to occasion' is, to cause occasionally; his second, simply, cause. Dr. Webster's is not substantially different, to give occasion to; to cause incidentally; to cause. Mr. Crabb appears to give a like construction to the word; 'what is caused, seems to follow naturally; what is occasioned, follows incidentally.' "

Curry v. Chicago & N. W. R. R. Co., 43 *Wis.* 655, 666."

The quotation from Crabb in the last citation that *"what is caused seems to follow naturally; what is occasioned follows incidentally"* very tersely defines

the accepted difference between the phrases "to cause" and "to occasion" in the broader sense wherein the two differ.

To the same point we cite

Kwong Lee Yuen v. Alliance Asse. Co., 16 *Haw.* 674.

In the case last cited the suit was upon a policy covering upon property in the Hawaiian Islands, and the defense of the company was that the fire by which said property was destroyed had been set by the authorities at another point for the purpose of destroying plague infected property, and the company claimed that the loss resulting from the spread of that fire was within the meaning of the exemption clause a loss by order of "civil authority." The Supreme Court of Hawaii in cases previously decided had held that under the policy provision upon which the company predicated its defense there was no liability if, in fact, the loss was by reason of a fire started by the authorities, and that losses by spread fires were within the protection of the clause relied upon. In the case cited it was conceded that the loss was by reason of the spread of a fire started by the authorities, but it was contended that the order under which that fire was set was not the cause of the loss because of the fact that a mistake had been made and the fire set to property other than that named in the order. This contention was sustained, the Court basing its ruling upon the proposition that by reason of the mistake the order was to be considered

as the occasion and not the cause of the loss. Said the Court: "If the buildings outside of the condemnation order were burned by mistake on the supposition that they were within the portion of the block that had been condemned, or that the entire block had been condemned and ordered burned, the fire could not be regarded as caused by the order. The order in such case would be merely an occasion, not the cause of the fire."

Finally, as to the point under consideration, a very recent Federal case would seem to be conclusive as against the view upon which the complained of ruling was based.

Standard Life Ins. Co. v. McNulty, 157 *Fed.* 224.

In that case the suit was upon an accident policy. The insured died from injuries which he sustained while he was trying to enter a moving car in which he was a passenger. The company defended upon the ground that the accident was one as to which it had stipulated it should not be liable, and this defense was based upon an exemption clause providing that the company should not be liable for "injuries sustained . . . while entering or leaving, or trying to enter or leave, any mvoing conveyance and should not be liable for any injury, fatal or otherwise, received while, or in consequence of, being or having been, under the influence of or affected by, or resulting dirctly or indirectly, wholly or partly, from intoxicants." In the lower Court it was contended, and the trial judge, (as was done by Judge Van Fleet in

this case), held that because in the first subdivision of the exemption clause the exception was simply as to *injuries*, while in the second subdivision it was as to *fatal injuries* an intention was evident to vary the effect of the exemption in the particulars referred to in the two subdivisions, and upon this theory judgment went for plaintiff. In the Court of Appeals it was sought to sustain this judgment upon the theory upon which Judge Van Fleet directed the verdict against us in this case, but the Appellate Tribunal held the argument to be fallacious. "The contention," said the Court, "was, and is, that all the terms of a contract should be given effect, and that the words *fatal or otherwise* in the second sentence have no effect if the word *injuries* in the preceding sentence includes injuries that are fatal as well as those that are not. The argument seems to be fallacious. The words 'fatal or otherwise' were not used to qualify or affect the injuries described in the former, but those specified in the latter sentence, in the sentence in which they were written only. They were inserted in this sentence to make it clear beyond question that all injuries, whether fatal or otherwise, resulting from intoxicants, and the other causes there specified were not covered by insurance. They accomplish this purpose, and have their intended effect just as completely whether the word 'injuries' in the preceding sentence is interpreted to include all injuries, or only those that are fatal, or those that are not fatal, only. . . . The word 'injuries' is a generic term, and it naturally included injuries of both classes, because

no one of either class is not an injury." Referring to the argument of counsel, similar to that which we have in this case, the Court said: "Counsel for the plaintiff invoke the familiar rule that a policy of insurance should be construed favorably to the insured in cases of doubt or ambiguity. But this rule ought not to be permitted to have the effect to make a plain agreement ambiguous, and then to interpret it in favor of the insured. 'Contracts of insurance like other contracts are to be construed according to the sense and meaning of the terms which the parties have used, and, if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary and popular sense. (Citing numerous Federal cases.) The natural obvious meaning of the provisions of a contract should be preferred to any curious hidden sense which nothing but the exigencies of a hard case and the ingenuity of a trained and acute intellect would discover. (Citing Delaware Ins. Co. v. Greer, 57 C. C. A. 188, 193, 120 Fed. 916, 921). The reasonable and probable meaning of a stipulation in an agreement should be preferred to one that is irrational and improbable. Citing Pressed Steel Car Co. v. Eastern Ry Co. of Minn., 57 C. C. A. 635, 637; 121 Fed. 610, 611). . . . The obvious and ordinary meaning of the word 'injuries' is all injuries, whether fatal or not, *and where the words of a contract are clear, and their common meaning is plain, there is no room for construction.* (Italics ours). In the light of these established rules of interpretation the fatal injury to the insured, which he

sustained while he was trying to enter a moving car, was excepted from the indemnity promised by the terms of his policy."

(c) Again, independently of both definition and decision, we submit that the intention of the author of the exemption clause to broaden the effect of the earthquake subdivision thereof is made apparent by a comparison of the words used in the two expressions "shall not be liable for loss caused directly or indirectly by," and "shall not be liable for loss or damage occasioned by or through."

In the first of the provisions the exception is as to loss, while in the second it is as to *loss or damage;* in the first it is as to loss by the excepted perils, while in the second it is as to loss *by or through* the perils immediately thereafter named. The phraseology in the second subdivision is of the most sweeping character, and even if it were true that "to cause" and "to occasion" mean the same thing the incorporation into the second subdivision of the clause of the additional words *"or damage"* and *"or through"* indicate the intention to widen the exemption to the furthermost possible limit. As to earthquake the company is not to be liable *for loss or for damage* whether brought about *by or through* an earthquake.

II

As to the meaning to be attached to the phrase "occasioned by or through," we call attention to cases in which the exception to liability found in this policy has been construed.

In *St. John v. American, etc., Co.*, 1 *Duer* 371; *Aff'd.* 1 *Kern* (*N. Y.*) 516, the limitation was against loss "occasioned by explosion of steam boiler," and it was held that the company was not liable for a loss resulting from a spread fire preliminarily started by the excepted peril upon property other than that insured.

In *United Life, etc., Co. v. Foote*, 22 *Ohio St.* 349, the exception was against loss "occasioned by or resulting from explosion," and in this case, as in that reported in Duer, it was held that the company was not liable for a loss resulting from a fire started by the excepted peril upon other property and spreading to and reaching that which was insured.

It having been thus judicially determined that an exemption from liability by reason of loss "occasioned by" an excepted peril covers a case such as we have in hand, then the same exception being found in the policy sued on in the present case the exception itself must be given the same effect.

Lowenstein v. F. & C. Co., 88 Fed. 474.
F. & C. Co. v. Lowenstein, 97 Id. 17.
F. & C. Co. v. Waterman, 161 Ill. 632; 44 N. E. Rep. 283.
Cooley Insurance Briefs, Vol. 1, p. 644.
Bargett v. Orient Mut. Ins. Co., 16 N. Y. Sup. St. (5 Bosw) 385.

III

But even if the premise upon which the trial judge based his conclusion were sound, to-wit, that "occa-

sioned by or through," standing alone, has only the same meaning as caused "directly or indirectly," still the ruling is wrong, for, assuming the fact to be so, we must find the intention of the parties in the usual and commonly accepted meaning of the words used. In entering upon this branch of our argument it may not be amiss to call attention to a few general rules having relation to the construction of insurance contracts.

The insurance was against loss or damage by fire. The Company did not undertake to make good a loss resulting from any agency other than fire, and could in no event be held liable for any other kind of loss, and hence, necessarily, the exceptions found in the exemption clause, including that from "loss occasioned by or through earthquake" had relation only to fire losses.

> *St. John v. American, etc., Co.,* 1 Duer 371; Aff'd 1 Kern (N. Y.), 516.
> *Imperial Ins. Co. v. Fargo,* 95 U. S., 257.
> *United Life, etc., Co., v. Foote,* 22 Oh. St., 349.
> *May on Insurance,* Vol. 2 (4th ed.), p. 958-9.

The statement of counsel for plaintiff in error was that the earthquake which visited San Francisco upon April 18th, 1906, started the fire, which in natural course and without known or intervening agency spread to and reached and destroyed the property to recover the loss for which the suit was brought. Assuming, as we must, that this proof could have been made, the loss is within the exception, and is a loss occasioned by and through earthquake.

Aetna Ins. Co. v. Boon, 95 U. S., 117.
Ins. Co. v. Tweed, 7 Wall (U. S.), 44.
St. John v. American, etc., Co., 1 Duer 371; Aff'd 1 Kern (N. Y.), 516.
United Life, etc., Co., v. Foote, 22 Ohio St. 349.
Kwong Lee Yuen v. Alliance Asse. Co., 16 Haw. Rep. 674 and cases cited.
German Ins. Co. v. Roost, 45 N. E. Rep. (Ohio), 1097.
Ermentrout v. Girard, etc., Ins. Co., 65 N. W. Rep. (Minn.), 635.
Lynn G & E. Co. v. Meriden F. Ins. Co., 33 N. E. Rep. 690 (Mass).

In construing a policy of insurance "Courts are governed by the same general rules which are applicable to other instruments and effect is to be given to the intention of the parties, to be ascertained by the same method which is employed in the interpretation of other written contracts." . . . "They" (policies of insurance) "are, after all, only written contracts, to be interpreted by the same rules which apply to other contracts, and to be enforced according to the intention of the parties."

Wells, Fargo & Co., v. Pacific Ins. Co., 44 Cal. 397.

Where, by reason of the language used, an ambiguity or uncertainty exists which cannot be removed by the application of the usual rules of construction the benefit of the doubt arising out of such ambiguity or uncertainty must be given to the in-

sured, but where, applying legal rules of construction, the meaning of the parties can be ascertained, that meaning is to be given to the agreement under consideration.

> *May on Insurance,* Vol. 1 (4th ed.), Sec. 172a.
> *Yoch v. Home Mutual Ins. Co.,* 111 Cal. 507 (last paragraph).

The Supreme Court of the United States, referring to the rule that where a policy may be *fairly* construed in either one of two different ways, that construction will be adopted which is favorable to the insured, says:

> "But this rule cannot be availed of to refine away terms of a contract expressed with sufficient clearness to convey the plain meaning of the parties, and embodying requirements compliance with which is made the condition to liability thereon."

> *Guarantee Co., etc., v. Mechanics' Savings, etc., Co.,* 183 U. S., 402; 22 Supr. Ct. Rep. 124.

In the latest of the Federal decisions, already referred to, the rule is very clearly stated.

The rule that a policy of insurance should be construed favorably to the insured in cases of doubt or ambiguity, said the Court in that case, "ought not to be permitted to have the effect to make a plain agreement ambiguous, and then to interpret it in favor of the insured. Contracts of insurance, like other con-

tracts, are to be construed according to the sense and meaning of the terms which the parties have used, and, if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary and popular sense. The natural obvious meaning of the provisions of a contract should be preferred to any curious hidden sense which nothing but the exigencies of a hard case and the ingenuity of a trained and acute intellect would discover. The reasonable and probable meaning of a stipulation in an agreement should be preferred to one that is irrational and improbable. . . . *And where the words of a contract are clear, and their common meaning is plain, there is no room for construction."* Italics ours).

Standard Life & Accident Ins. Co. v. McNulty, 157 Fed. 224; (C. C. A. Eighth Circuit).

Now, concededly, the language under consideration, to-wit, "this company shall not be liable . . . for loss or damage occasioned by or through earthquake" would in and of itself exempt from liability in this case but for the reason given for the ruling to the contrary. The trial judge conceded this, and, until informed otherwise by counsel for defendant in error, we will assume that there is no dispute upon this point. And, this being so in the light of the cases, upon what theory can the ruling be sustained? The learned trial judge, it may be mentioned, suggests none, and we submit that none can be found.

In the first place, if the phrases "caused directly or indirectly" and "occasioned by or through" mean

the same thing, why should the latter be given the narrower and the more limited operation?

It is a rule of general application that the words used in a contract are to be understood in their ordinary and popular sense unless used in a technical sense, or unless a special meaning is given to them by the user. *Standard Life & Accident Ins. Co. v. McNulty* (Supra). And such, as we have seen, is the rule in this State.

And nowhere can it be found laid down, and, independently of the cases to the contrary to which we have called attention, there is, we submit, no justification for the ruling that words found in a contract will be given a meaning which they would not otherwise bear merely because as to some other similar matter dealt with in the agreement other words having the same signification are found.

Suppose that in the policy in suit the order of the phrases "caused directly or indirectly" and "occasioned by or through" had been reversed, then according to the ruling the latter would have been given the wider and the former the narrower meaning, and this notwithstanding the true meaning of the words used. Upon what possible theory can any such result as this be worked out?

The truth is that the reason upon which it is attempted to narrow the earthquake exemption is wholly fanciful. There is nothing in the nature of the contract nor in the character of the various perils specified in the several subdivisions of the exemption clause which furnishes any reason why, as to a loss

resulting from a fire brought about by the perils mentioned in the second subdivision of that clause (volcano, earthquake, hurricane, etc.), the company should extend or widen the protection to the insured beyond that given as to the other excepted perils (invasion, insurrection, etc). The whole texture of the clause negatives this idea, and so far as the ruling itself is concerned it seems to us that the answer to it is to be found in the statement of Judge Van Fleet that standing alone the phrase "occasioned by or through" would have the extended meaning for which we contend, and that it is to be given the narrower construction which he attaches to it only because found in company with the same clause with the other expression (meaning, according to the Judge, the same thing) "caused directly or indirectly."

If, as the trial judge in his opinion concedes, the phrase "this company shall not be liable for loss or damage occasioned by or through earthquake" standing alone means what we say it does and would be held to exempt from a loss resulting from the spread of an earthquake fire, why is its operation to be restricted so that a loss to fall within that clause must be by a fire which originates on the premises where the loss occurred? If the Court can so confine the operation of the loss, why not make the effect thereof more certain by fixing an arbitrary distance of say one thousand, or if the Judge might prefer, one hundred feet, from the exterior edge of the insured property?

Let us suppose the insured property to be the con-

tents of a stable upon a city lot and within an enclosure upon which the residence of the owner stands. Would an earthquake fire started in the residence and thence coming into contact with the insured property be within the exemption? Would this be a fire "originating on the premises where a loss occurs?" And if not, why not?

Or, again: Suppose two policies in this form issued by the company, one covering upon the furniture in a room upon the ground floor and the other upon that in one upon the top floor of a building. If an earthquake should start a fire in the room upon the ground floor and that fire should consume the building and its contents, would the company be exempt as to the one policy and liable under the other? According to the ruling this would be the result.

Again, let us suppose the destruction of a forest by a fire which, starting in the brush at one side thereof, extends from tree to tree across such openings as may happen to exist until in its course the whole forest is consumed. Would there in that case be more than one fire, and would a company issuing a policy in this form upon the timber (assuming the fire to be of earthquake origin), be liable because the fire was started in the uninsured brush? Would not the excepted peril in this case occasion the loss; would it not be continuously operative from the moment of its starting?

There can be only one answer to these questions, and it is found in the rulings of the Supreme Court of the United States in the *Boon* and *Tweed* cases,

supra. "The attack, as a cause," said the Court in the Boon case, "in that case never ceased to operate until the loss was complete. It was the *causa causans* which set in operation every agency that contributed to destruction. It created the military necessity for the destruction of the military stores in the City Hall, and made it the duty of the commanding officer of the Federal forces to destroy them. His act, therefore, in setting fire to the City Hall, was directly in line of the force set in motion by the usurping power, and what that power must have anticipated as a consequence of its action."

Again, in the Tweed case (supra) the same Court, speaking to the same point, says of the explosion (the excepted peril in that case): "The explosion undoubtedly produced or set in operation the fire which burned plaintiff's cotton. The fact that it was carried to the cotton by first burning another building supplies no new force or power which caused the burning. Nor can the accidental circumstance that the wind was blowing in the direction to favor the progress of the fire towards the warehouse be considered a new cause. . . . If the fire had taken place by means of invasion, insurrection, riot or civil commotion, earthquake or hurricane, and by either of these means the Marshall warehouse (that in which the explosion occurred) had been first fired, and the fire had extended, as we have shown it did, to the Alabama warehouse (that in which the insured cotton was stored), would the insurance company have been liable? Could it be held as necessary to exemption that the persons

engaged in riot or invasion must have actually placed the torch to the building insured, and that in such case, if half the town had been burned down, the company would have been liable for all the buildings insured except the first one fired? Or if a hurricane and earthquake had first started the fire, is the exemption limited in the same manner? These propositions cannot be sustained, and in establishing a principle applicable to fire originating by explosion (the excepted peril in this case), we must find one which is equally applicable under like circumstances for the other causes embraced in the same clause."

And to the same effect are the other cases cited *supra.*

IV.

That there can be no good reason for holding that because two expressions having the same meaning are used in the contract the second, or for that matter either of them, must be given a more limited effect, can, it seems to us, be aptly illustrated in this way:

Suppose that the policy in suit having provided that the company should not be liable for loss caused directly or indirectly by certain specified perils other than earthquake, it should have been immediately thereafter added "nor for loss or damage directly or indirectly produced or brought about (i. e., caused) by earthquake." Now, would it not be quite absurd to say that because of the variation in the phrasing, the two exceptions being identical in meaning, the Court would be compelled to give to either one of them a narrower effect than to the other? We submit that there can be but one answer to this query.

V.

At the time the policy sued on was executed it was, and still is, the law of this State that "where a peril is specially excepted in a contract of insurance a loss which would not have occurred but for such peril is thereby excepted although the immediate cause of loss was a peril which was not excepted."

Civil Code of California, Section 2628.

The excepted-to ruling under discussion was squarely and directly in the face of this provision of the law which entered into and was a part of the contract between the parties. Earthquake was unquestionably a peril specially excepted in the contract and upon the proof offered the loss would not have occurred but for such peril, and this being so, the case is clearly within the section cited. We will leave it to counsel for defendant in error to harmonize the ruling of the Court with this specific provision of the Code and to explain in what way the presence in the agreement of another exception having relation to other perils can modify, alter or lessen the force thereof.

We respectfully submit that, for the error upon which we have brought the cause into this Court, the judgment should be reversed.

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